In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1421

PETER W. WEBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the District of New Jersey on three charges (counts 1, 2 and 3) of violation of 29 U.S.C. 186(b) in that, as business manager of a local of the International Union of Operating Engineers, he received payments from H. C. Price Company, an employer of members of that union. He was also convicted under three counts (originally in a separate indictment) charging conspiracy to violate and violation of the Hobbs Act by forcing the Bechtel Corporation to award a subcontract to the Joyce Pipeline Company. Petitioner was given concurrent sentences of imprisonment for ten years on two of the Hobbs Act counts and placed on pro-

bation on the remaining such count. He was fined $10,000 on each of counts 1, 2 and 3. The court of appeals affirmed.

Petitioner's present contention relates to evidence bearing only on the transaction in counts 1, 2 and 3.

The Price Company, which wanted to obtain a contract to construct a pipeline for Colonial Pipeline, noticed that competing construction companies operated under favorable labor conditions unavailable to Price. (G. App. 47).[1] Mr. Price, the president of the company, decided to enlist petitioner's help in resolving the labor situation. To that end he sent an assistant (Mr. Burgess, who died before trial) to New Jersey to deal with petitioner (G. App. 48). The issue which petitioner raises relates to the admissibility of testimony by various witnesses as to what Burgess reported to them.

Burgess reported to Price that petitioner wanted "tax-free cash" (App. 83, 91). Price discussed the matter with other members of the company, Overton and Shivel (App. 92), and it was ultimately decided to make 3 payments of $3,500 each (App. 109). A check to Burgess for $3,500 was drawn on June 25 (App. 109). Burgess reported to Price that he had made the payment (App. 111–112).

Price testified that Burgess was nervous about making the payments and that Price, Overton and Shivel agreed to have checks drawn in their names which

[1] G. App. references are to the Appendix for Appellee and "App." references are to the Appendix to Appellant's Brief in the court below, both of which are being lodged with the Clerk of the Court.

they would cash for the other payments to petitioner (App. 114–115). Price cashed $2,000 (App. 116). Subsequently Burgess reported to Price that he had received the additional money from Overton and had given the cash to petitioner (App. 121–122). The third check was drawn to Burgess, who reported that he had delayed cashing it in the hope that payment would not be necessary but had subsequently made the payment (App. 151). Dates of various occurrences were fixed by reference to Burgess' expense accounts (App. 84, 89–91, 112–113, 117; 141, 144–145, 151).

Overton testified that, after the first payment, Burgess said he was upset about making the payments and other officials should assume equal responsibility (App. 158). Overton testified to having $1,500 drawn to his name and giving the cash to Burgess (App. 158–159, 165).

Burgess' secretary testified that in June she mailed a check to Burgess at the company office in New Jersey. She said that on his return he was upset (App. 170) and told her he was worried because the check represented a payment to petitioner and he was concerned about its appearing on his expense account. She also testified to a call in August for another check for $3,500 which Burgess told her was for petitioner (App. 174–177).

It is evident that the testimony as to statements by Burgess related to statements made during the existence of the conspiracy and in furtherance thereof. Even if Burgess had been alive at the time of trial, the testimony here at issue would have been admis-

sible under the well-established rule that statements of a conspirator in furtherance of a conspiracy are admissible against his co-conspirators. This Court has frequently recognized the basic validity of this rule. See *Wong Sun* v. *United States,* 371 U.S. 471, 490; *Lutwak* v. *United States* 344 U.S. 604, 617. This case in no way involves the question which concerned the Court in *Dutton* v. *Evans,* 400 U.S. 74, and apparently in *Bostic* v. *United States,* No. 5250 this Term, as to how long a conspiracy can be said to continue so as to render this rule applicable. Indeed, since *Dutton* v. *Evans* recognized that states could deem a conspiracy to continue when its only object was to conceal a previously committed crime, that decision reaffirms the continuing viability of the co-conspirator rule as to statements made in the course of an ongoing conspiracy.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

[2] Rule 8-04(b)(4) of the proposed federal rules of evidence, to which petitioner refers (Pet. 10), deals with statements against interest, such as post-conspiratorial confessions. Statements by a co-conspirator in furtherance of an ongoing conspiracy are not admitted on this principle but, essentially, on agency principles.

CERTIORARI DENIED N.C.R.